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in the Supreme Court of the United States

October Term, 1980

CIRCUIT JUDGES DIXIE HERLONG CHASTAIN, etc., et al.,

Petitioners

vs.

HILARY DAVIS, individually and on behalf of all others similarly situated,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER EITHER FEDERAL HABEAS JURISDICTION OR 42 U.S.C. §1983 PERMITS A FEDERAL COURT TO ENTERTAIN A CHALLENGE TO COMPLETED STATE DEPENDENCY PROCEEDINGS TO REMOVE A CHILD FROM THE CUSTODY OF PARENTS WHEN STATE OFFICIALS CHOOSE TO WAIVE THE DEFENSE OF RES JUDICATA AND LITIGATE THE MERITS OF THE STATE PROCEEDING.

II.

WHETHER IN LIGHT OF THE IRREPARABLE DAMAGE TO THE PARENT-CHILD RELATIONSHIP INHERENT IN PROLONGED SEPARATION AND THE DOCUMENTED RISK OF ERRONEOUS DEPRIVATION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE STATE OF FLORIDA TO FURNISH COUNSEL TO INDIGENT PARENTS IN FORMAL ACCUSATORY DEPENDENCY ADJUDICATORY PROCEEDINGS IN WHICH IT SEEKS TO REMOVE CUSTODY OF A CHILD FROM HIS PARENTS FOR A PROLONGED OR INDEFINITE TIME.

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STATEMENT OF THE CASE

The State of Florida files approximately 2,000 petitions each year in the Dade County Circuit Court to adjudicate a child dependent. Many petitions involve allegations of abuse or neglect, and a disproportionately high number involve the children of indigent parents. The great majority of abuse and neglect petitions result in an adjudication of dependency and temporary commitment of the child to foster care for a prolonged or indefinite period under the aegis of the Florida Department of Health & Rehabilitative Services (DHRS). In its most recent evaluation, DHRS found that the mean stay in foster care for dependent children is 2 years and 10 months.[1] A Dade County Grand Jury investigation of foster care found that in 36 percent of cases examined, children had been in foster care more than 5 years.[2]

Respondent brought this action following exhaustion of state judicial remedies challenging a Dade County Circuit Court order adjudicating her child dependent and committing him to the temporary custody of DHRS. Her two count complaint predicated jurisdiction under 28 U.S.C. §1343, asserting a claim under 42 U.S.C. §1983, and under 28 U.S.C. §2241-54, and alleged that she was deprived of the custody of her son in violation of the fourteenth amendment because, although she

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[1]An Evaluation of Child Welfare Services, Office of Evaluation, Florida Department of Health & Rehabilitative Services at 30-31 (1979). The report found children who had been in foster care for as long as 17 years and 8 months. *Id.*

[2]*Id.*, at 71-73.

was indigent and had unsuccessfully sought to obtain counsel, she was not provided with counsel at the dependency adjudicatory hearing. Respondent sought the return of her son, and declaratory and injunctive relief on behalf of herself and others similarly situated requiring the appointment of counsel for indigent parents in dependency proceedings. Petitioners, Circuit Judges in the Juvenile Division of the Dade County Circuit Court, neither pleaded nor argued res judicata nor judicial immunity, and chose to litigate the constitutional questions on their merits. After an evidentiary hearing, the District Court entered an order declaring respondent's complaint for declaratory and injunctive relief against petitioners maintainable as a class action. Subsequent to class certification, the Dade County Circuit Court returned temporary custody of Carl Davis to respondent subject to the court's jurisdiction and supervision as a dependent child.

By memorandum and order of November 23, 1977, the District Court entered a summary final judgment in favor of respondent. The opinion, reported at 442 F.Supp. 258 (S.D. Fla. 1977) held that indigent parents have a constitutional right to court appointed counsel in dependency and neglect proceedings. The District Court entered an amended final judgment on January 25, 1978 formally declaring the right to counsel in dependency proceedings, ordering petitioners to appoint counsel, and awarding respondent costs and attorney's fees.

Petitioners belatedly appealed from the amended final judgment, arguing only the merits of the constitutional rule upon which it rested. A panel of the

United States Court of Appeals affirmed the amended final judgment, vacating the award of attorney's fees. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980). Petitioners moved for rehearing en banc, and for the first time in this litigation argued that the District Court improvidently exercised its jurisdiction over the section 1983 claim, and lacked jurisdiction over the habeas claim. The Court of Appeals reheard the case en banc, and in an opinion reported at 640 F.2d 599, affirmed that part of the amended final judgment vacating the dependency adjudication, modified the declaratory relief, holding that indigent parents have a right to counsel in dependency adjudicatory proceedings in which the state seeks prolonged or indefinite custody, vacated as unnecessary the injunctive relief, and reversed the award of attorney's fees. Petitioners sought and obtained a stay of the mandate of the Court of Appeals, but neither sought nor obtained a stay of the judgment of the District Court. Since shortly after entry of the amended final judgment, petitioners have been appointing counsel in dependency adjudicatory proceedings.

The facts which gave rise to this litigation are largely undisputed. On January 30, 1976, respondent's then husband hit her 14 month old baby, Carl, breaking his arm. Respondent immediately left her husband and immediately secured medical assistance for her son, relating the circumstances of his injury to doctors and social workers in attendance. While Carl underwent treatment, an attending social worker determined that the state agency responsible for investigating suspected cases of child abuse should be notified and should seek custody prior to his release.

The state, which operates public assistance programs designed to help abandoned families, initiated a dependency proceeding under Chapter 39, Florida Statutes, seeking to remove Carl from the custody of respondent. Respondent attended an emergency hearing on February 4 without counsel held only hours following service of process in the Juvenile and Family Division of the Dade County Circuit Court. The presiding judge did not offer to appoint counsel for respondent during the emergency hearing but advised her to have counsel at the formal adjudicatory hearing, and granted custody of Carl to DHRS pending the formal hearing.

Because she was indigent, respondent was unable to retain private counsel to represent her at the March 4 adjudicatory hearing. Her efforts to obtain counsel through local legal aid offices were unsuccessful, and she appeared at the dependency adjudicatory hearing without counsel.

It was the policy and practice of Dade County Circuit Judges to conduct dependency proceedings without advising indigent parents of their right to court appointed counsel and without appointing counsel to represent indigent parents. (Complaint, Paragraph 41, R. at 7, admitted in Answers, Paragraph 5, R. at 132.) Judge Gelber conducted the dependency adjudicatory hearing. The transcript of that hearing, reproduced as an appendix to the Petition for Certiorari, reflects that, although he knew of her repeated unsuccessful attempts to secure representation, the judge neither asked respondent if she would like the assistance of counsel nor offered to appoint counsel to represent her. (A 177-179). Although under Florida law the temporary

custody which the state sought "shall continue until terminated by the court or until the child reaches the age of 18,"[3] the court never apprised respondent of its legal significance.

At the conclusion of the hearing, Judge Gelber adjudicated Carl Davis dependent, committing him to the temporary custody of DHRS pursuant to Sections 39.10(4) and 39.11(1)(c), Florida Statutes. Judge Gelber concluded the hearing by telling Hilary Davis:

> I want you to contact that lawyer that you spoke to, tell him what happened, and advise him that he can—well, tell him to get in touch with Mr. Jaski [counsel for the state], and he will fill him in as to what happened, and he can then take whatever action he deems appropriate in your best interest.

(A 199). He did not advise her of her right under Section 39.14(1), Florida Statutes, to appeal from the adjudication of dependency.

Hilary Davis retained counsel after the expiration of the 30 days within which to appeal the adjudication of dependency.[4] On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Florida Supreme

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[3]Fla. Stat. §39.11 (1)(c).

[4]Judge Brown's dissent from the panel opinion reproduced in the Appendix at A 62-77 was predicated upon the mistaken assumption that Florida law permitted the taking of an appeal within 60 days following the entry of a final judgment. When apprised of the error, Judge Brown amended his dissent, and the amended version appears in the bound report of the decision.

Court seeking the return of her son on the ground that the failure of the Circuit Court to apprise her of her right to the assistance of court appointed counsel and to appoint counsel to represent her deprived her of due process of law and the equal protection of law in violation of the fourteenth amendment. The Florida Supreme Court denied her Petition without opinion on May 18, 1976, and this litigation followed.

ARGUMENT

I.

BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY EXERCISED ITS JURISDICTION UNDER 28. U.S.C. §1343 TO HEAR RESPONDENT'S CLAIM UNDER 42 U.S.C. §1983, IT IS UNNECESSARY TO REVIEW THE ALTERNATIVE HOLDING OF THE COURT OF APPEALS THAT JURISDICTION LIES UNDER 28 U.S.C. §2241-54.

While petitioners correctly note the conflict among the circuits over the scope of federal habeas jurisdiction in state initiated child custody matters, they fail to recognize that the holding below respecting habeas jurisdiction is but one of two alternative grounds upon which the Court of Appeals upheld the exercise of federal jurisdiction. Respondent predicated her claims for relief upon 42 U.S.C. §1983 and upon federal habeas jurisdiction under 28 U.S.C. §2241-54. In resolving objections to the exercise of jurisdiction which petitioners raised for the first time in their petition for rehearing en banc, the Court of Appeals held that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) did not require dismissal of the section 1983 claim,[5] and that respondent properly invoked federal habeas jurisdiction.[6]

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[5] *Davis v. Page*, 640 F.2d 599, 601 (5th Cir. 1981); A 90-92.

[6] *Id.* at 602; A 92-95.

Petitioners appear to have abandoned their argument, first advanced in their rehearing petition in the Court of Appeals, that the *Younger* doctrine barred consideration of respondent's section 1983 claim. The first of petitioner's Questions Presented for Review and the accompanying argument only seek review of the holding below that respondent's claims come within the scope of habeas jurisdiction. Since petitioners do not contest the holding below that the district court properly reached the merits of the section 1983 claim, no purpose would be served in rendering what in the context of this litigation would be essentially an advisory opinion delineating the scope of federal habeas jurisdiction in state initiated child custody proceedings.

While the Court has in exceptional cases granted certiorari to review a question not presented in the petition for certiorari, there is no reason sufficient to exercise that power in this case to review the holding of the Court of Appeals that the *Younger* doctrine is inapposite. When respondent began this action, the dependency adjudicatory proceeding had concluded. She had exhausted all available state remedies to challenge the dependency adjudication when the Supreme Court of Florida denied her petition for habeas corpus. Neither her complaint nor her motion for summary judgment sought to intrude into any pending dependency adjudicatory proceeding. Rather she sought relief from the past adjudication based upon her right to counsel. The amended final judgment in its original form and as modified does not enjoin any pending dependency proceeding. Against this background, the Court of Appeals held that since the state adjudicatory proceeding had concluded and respondent had exhausted state judicial

remedies, the *Younger* doctrine did not require dismissal of her section 1983 claim. That decision is in accord with the prior decisions of this Court.

In an unbroken lines of cases beginning with *Ex Parte Young*, 209 U.S. 123 (1908), the Court has recognized the power of the federal courts to protect against the deprivation of federal constitutional rights by state officers. *Younger v. Harris*, 401 U.S. 37 (1971) established a now well-recognized exception to the rule of *Ex Parte Young*: in the absence of extraordinary circumstances, considerations of equity, comity and federalism prohibit a federal court from interfering with a pending criminal prosecution. The court has since expanded the *Younger* doctrine to prohibit interference with certain pending civil proceedings, holding most recently in *Moore v. Sims*, 442 U.S. 415 (1979) that absent extraordinary circumstances, considerations of comity and federalism prohibit a federal court from enjoining the prosecution of a pending proceeding to adjudicate a child dependent.

Throughout its development, the touchstone of the *Younger* doctrine has been the prohibition against equitable relief directed at *pending* state judicial proceedings. The Court has never intended *Younger* as a general bar to federal jurisdiction in suits seeking declaratory and injunctive relief against state officers. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Court held that prospective relief against future threatened judicial proceedings is generally available as long as the proceeding in question is not yet pending. While expanding *Younger* to include certain pending civil proceedings, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) further sharpened *Younger's* focus on pending

proceedings. *Huffman* held that the *Younger* considerations of comity and federalism require that a state defendant who would challenge as a federal plaintiff the judgment of a state trial court must first exhaust available state judicial remedies.[7] 420 U.S. at 607-611. Thus *Huffman* held that a federal plaintiff who has exhausted state remedies may proceed unencumbered by the *Younger* doctrine.[8]

Respondent vigorously pursued her available state remedies before resorting to federal litigation. Only when she had exhausted available state remedies did she initiate federal proceedings. Unlike the federal plaintiff in *Moore v. Sims, supra*, respondent did not launch a multifaceted challenge seeking to enjoin the state from conducting a pending proceeding to adjudicate a child dependent; her claim was narrowly focused and does not challenge Florida's authority to protect its children under Chapter 39. The decision below that her section 1983 claim was properly before district court is therefore in accord with prior decisions of this Court.

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[7]Because the federal plaintiff in *Huffman* deliberately bypassed state judicial remedies, federal relief was unavailable. Similarly, in *Juidice v. Vail*, 430 U.S. 327 (1977), federal relief was unavailable to state defendants who, although represented by counsel, deliberately bypassed available state remedies in favor of federal injunctive relief against a pending state contempt proceeding. 430 U.S. at 330-33.

[8]In so ruling, *Huffman* announced a rule for section 1983 plaintiffs challenging state adjudications analogous to the exhaustion requirement in federal habeas corpus proceedings embodied in 28 U.S.C. §2254. In both instances, the exhaustion requirement avoids unnecessary friction between the federal and state judicial systems by assuring state courts an opportunity to correct constitutional errors.

In holding that the *Younger* doctrine was inapplicable, the Court of Appeals decided a question unlikely to recur. As the Court noted in *Huffman*, a federal plaintiff challenging a state judgment or order ordinarily will encounter the defenses of res judicata and collateral estoppel. In this case, petitioners neither pleaded nor argued those defenses below, choosing instead to litigate the merits of the asserted right to counsel. When they lost in the district court, they only belatedly appealed, and in their argument before the panel, petitioners sought to litigate only the merits. Petitioners raised *Younger* only after choosing to litigate on the merits and losing twice. Following rejection of their argument in the Court of Appeals, they have not raised *Younger* here. The Court should not now raise it sua sponte, and should therefore decline to review the scope of federal habeas jurisdiction.

II.

THE COURT OF APPEALS CORRECTLY ANTICIPATED THE REASONING OF *LASSITER* WHEN IT HELD THAT THE FOURTEENTH AMENDMENT REQUIRES THE PROVISION OF COUNSEL TO INDIGENT PARENTS IN FLORIDA DEPENDENCY PROCEEDINGS IN WHICH THE STATE SEEKS INDEFINITE OR PROLONGED TEMPORARY CUSTODY OF A CHILD.

While the Court of Appeals decided this case without benefit of this Court's recent decision in *Lassiter v. Department of Social Services of Durham County, North*

Carolina, No. 79-6423 (U.S. June 1, 1981), it is apparent from the limited scope of the en banc decision and the statutory framework of Florida dependency proceedings that the decision anticipates and correctly applies the *Lassiter* criteria. *Lassiter* requires a weighing of the parents' interest, the risk of erroneous deprivation, and the state's interest, criteria first announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In fashioning a narrowly drawn right to counsel, the Court of Appeals applied *Mathews*, concluding that in Florida dependency proceedings in which the state seeks prolonged or indefinite custody, the presumption against appointed counsel is overcome. Because the parent's interest in the Florida proceeding is significantly greater that the interest at stake in *Lassiter*, because the risk of erroneous deprivation of that interest is far greater, and because Florida has by statute foresworn any interest in informality, *Lassiter* requires precisely the conclusion reached by the Court of Appeals. Thus, it would serve no purpose to remand these proceedings to the Court of Appeals for reconsideration in light of *Lassiter*.

A. The Decision Below Fashions a Limited Right to Counsel in a Narrow Category of Florida Dependency Proceedings

Contrary to petitioners' assertions, the Court of Appeals substantially narrowed the absolute right to counsel fashioned by the District Court, limiting the right to those cases in which the state seeks to deprive a parent of prolonged or indefinite custody.[9] The decision below is thus inapplicable to those dependency

[9] 640 F.2d at 604; A 103.

proceedings in which the state seeks only protective supervision or temporary placement in the home of a relative.[10]

Florida law authorizes an adjudication of dependency upon a showing that parents have abandoned, abused, or neglected a child, upon voluntary surrender for adoption, and upon a showing that the child is habitually truant, persistently disobedient, or has persistently run away.[11] A dependency adjudication founded upon allegations of habitual truancy, persist disobediance, or persistently running away will in the first instance result in judicial supervision in the home of parents or relatives.[12] When the state seeks to take a child from his parent for a prolonged or indefinite period in the absence of prior adjudications, it will allege that the child is abandoned, abused, or neglected.[13] Thus, the decision below is effectively limited to those cases in which the state seeks prolonged or indefinite custody based upon abandonment, abuse, or neglect.

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[10]Fla. Stat. §39.41(1).

[11]Fla. Stat. §39.01(9).

[12]*See, e.g., D.H. v. Polen*, 396 So.2d 1189 (Fla. Dist. Ct. App. 1981); *cf. In re A.Z.*, 383 So.2d 934 (Fla. Dist. Ct. App. 1980).

[13]When the adjudication is based upon voluntary surrender for adoption, the parent must execute a waiver of the right to counsel. Fla. R. Juv. P.

B. The Parent's Interest in Actual Care and Custody at Issue in Adjudicatory Proceedings is Greater Than the Judicially Curtailed Interest of a Parent Previously Deprived of Care and Custody at Issue in Termination Proceedings.

As *Lassiter* recognizes, the parent's interest in care, custody, and companionship of her child is profound. The core of that liberty interest is actual care and custody, an interest which is not at stake in termination proceedings.[14] Medical evidence in the record below and generally accepted medical literature make clear the great damage which occurs to the parent-child relationship and to the child's development when the state removes a child for a prolonged or indefinite period.[15] Subsequent restoration of custody cannot repair

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[14]Proceedings to terminate parental rights presuppose a previous adjudication of dependency and commitment to foster care. As *Lassiter* notes, termination proceedings focus upon parental conduct subsequent to the loss of custody. Slip op. at 10 n.4. In North Carolina, there is an absolute right to counsel in adjudicatory proceedings. N.C.G.S. 7-A-587.

[15]442 F.Supp. at 261 n.7. The devastating impact of prolonged separation upon the parent-child relationship and upon the child is well documented. Bowelby, Child Care and the Growth of Love 13-20 (2d ed. 1965); Buxbaum, *The Problem of Separation and the Feeling of Identity*, Child Welfare 8 (1955); Geiser, The Illusion of Caring: Children in Foster Care 35-129 (1972); Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 9-38 (1973). An evaluation by DHRS of child welfare services indicates that some 19% of children in foster care in Florida are emotionally disturbed. *An Evaluation of Florida's Child Welfare Services*, at 33.

that damage,[16] and termination of parental rights cannot exacerbate it.[17]

Termination of parental rights is ultimately the legal recognition that the parent-child relationship is dead. The actual death of that relationship occurs prior to the initiation of termination proceedings, and is the all but inevitable result of prolonged separation. Thus, in every meaningful sense, far greater interests are at stake when the state first seeks prolonged or indefinite custody in an adjudicatory proceeding that when it seeks judicial recognition of the consequences of that separation in a termination proceeding.

The interest of the parent at stake when the state seeks prolonged or indefinite custody in an adjudicatory hearing is reinforced by the peculiar structure of Florida proceedings. Once an adjudication of dependency enters, the nature of further proceedings shifts dramatically. A child committed to temporary state custody remains in state custody until a court orders otherwise or the child reaches the age of 18.[18] All subsequent proceedings are disposition hearings in which a parent must prove that, because of developments subsequent to the

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[16]Goldstein, Freud, & Solnit, *supra* at 38.

[17]As the duration of separation increases, the case for termination becomes compelling; the child's interest dictates permanent placement in a new home to fill the void created by prolonged separation. See generally Goldstein, Freud, & Solnit, *supra*; Goldstein, Freud Before the Best Interests of the Child (1980).

[18]Fla Stat. 39.41(1)(c).

adjudication, restoration of custody is in the best interest of the child. Florida courts have held:

> Evidence that may be totally inadequate to deprive a parent of the custody of his child in the first instance may be altogether adequate to support the court's refusal to restore custody to the parents once the child has become a ward of the state.[19]

Thus, the liberty interest of a parent is greatest when the state initiates a dependency proceeding seeking prolonged or indefinite custody of a child.

C. Under Florida Law, the State Has No Interest in Informality.

Florida has no counterveiling interest in informality at dependency adjudicatory hearings, for it has invested them with all the trappings of formal accusatory proceedings. By statute, the state is always represented by counsel under formal rules of evidence.[20] Under Florida law, social workers cannot prosecute contested

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[19]*Pendarvis v. State*, 104 So.2d 651, 652 (Fla. Dist. Ct. App. 1958). The Pendarvis parents repeatedly failed in efforts to recover custody of their child, each time foundering upon the same critical distinction between adjudicatory hearings and disposition hearings. *Pendarvis v. State*, 104 So.2d 651 (Fla. Dist. Ct. App. 1958); *Pendarvis v. State*, 115 So.2d 81 (Fla. Dist. Ct. App. 1959); *Pendarvis v. State*, (Fla. Dist. Ct. App. 1960) (unreported decision); *In re Pendarvis*, 133 So.2d 424 (Fla. Dist. Ct. App., 1961).

[20]Fla. Stat. §§39.404(3), 39.408(1)(b).

proceedings.[21] Thus, in the *Lassiter* calculus, the state interest in informality is always at its weakest in Florida.

D. There is a Great Risk of Erroneous Deprivation in Florida Dependency Proceedings.

The record below established by uncontroverted evidence the risk of erroneous deprivation. No party has yet suggested that respondent's child should have been removed from her custody.[22] An attorney who has prosecuted more than 100 dependency adjudicatory proceedings on behalf of DHRS stated in his affidavit that unrepresented parents rarely cross-examine witnesses, submit documentary evidence, call witnesses, or present a defense. (R. at 141). Because unrepresented parents do not understand the proceedings, many "sit mute and passive and do nothing in their own defense, thereby giving, wrongfully, the impression that they just don't care." (R. at 142).

The transcript of the adjudicatory hearing, reproduced as an appendix to the Petition for Certiorari, demonstrates what happens to a lay parent unfamiliar with the judicial process. Without counsel, respondent was reduced to "little more than a spectator."[23] The protection theoretically afforded her by ordinary rules

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[21]Fla. Stat. §39.404(3).

[22]Significantly, DHRS, the agency which initiated the proceedings in state court, did not appeal from the decision of the District Court.

[23]442 F. Supp. at 260, A 143; 640 F.2d at 603, A 100.

of evidence quickly dissolved in a torrent of inadmissable hearsay and opinion testimony. Respondent never understood that temporary custody could last until her child became an adult, and lacking legal training, she was unable to participate effectively in the proceedings. As the Court of Appeals noted, her case was not unique.[24]

It is evident that counsel can contribute substantially to prevention of an erroneous adjudication of dependency. Beyond excluding the inadmissable evidence, counsel in this case could have argued persuasively that the evidence was inadequate to sustain an adjudication of dependency, pointing out that respondent's former husband injured her son, that she was separated from him, and that readily available public assistance programs would have provided a regular and secure income with which to house and care for her son. In light of testimony that respondent's former husband represented a continuing threat to the safety of respondent and her son, counsel could have argued that rather than removing the child from his mother, the state should either prosecute her former husband or initiate civil commitment proceedings. Because respondent was not represented by counsel, none of these arguments were made, and she lost custody of her child for one year.

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[24]*See, eg., In re A.Z.*, 383 So.2d 934 (Fla. Dist. Ct. App. 1979); *In re R.W. H.*, 375 So.2d 321 (Fla. Dist. Ct. App. 1979). In both cases, parents were fortunate enough to obtain counsel after the hearings in question, and secured reversals of the dependency adjudications. Had they not obtained counsel, there would have been no appeal, their cases never would have come to light, and they would have found themselves in the same position as the great majority of unrepresented parents—childless.

Under the three pronged analysis of *Mathews*, reaffirmed in *Lassiter*, the Court of Appeals reasoned that an indigent parent has a right to counsel in dependency adjudicatory proceedings in which the state seeks prolonged or indefinite custody. The case by case right respondents advocate, a right which has existed in Florida since 1973, has not worked,[25] and cannot work. While a trial judge in a termination proceeding has a substantial record based upon earlier dependency proceedings to assist him in determining whether to appoint counsel, the factors by which courts might make case by case judgments in adjudicatory proceedings are unknowable in advance of the proceedings. The right to be heard must encompass the right to counsel in adjudicatory proceedings in which the state seeks prolonged or indefinite custody.

[25]To date, not a single decision of a Florida appellate court has reversed an adjudication of dependency resulting in a temporary commitment to DHRS for failure to appoint counsel.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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